Nos. 17-586, 17-626

In the Supreme Court of the United States

GREG ABBOTT, ET AL., APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANTS

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Plaintiffs' briefs are a study in revisionist history. Unable to explain how the Texas Legislature could have engaged in intentional racial discrimination by adopting maps imposed by the district court itself, plaintiffs insist that the actions of the 2013 Legislature are essentially irrelevant. They even characterize the 2013 Legislature's enactment of the court-ordered plans as "legislative inaction." That is nonsensical. The districts plaintiffs challenge are districts duly enacted by the 2013 Legislature. The intentions this Court must examine are therefore the intentions of the 2013 Legislature. And plaintiffs cannot blind the Court to the reality that the 2013 Legislature enacted the 2013 maps only after those maps received the imprimatur of a federal three-judge district court.

Plaintiffs protest that the district court did not draw the challenged districts in the first instance, and that its 2012 decisions imposing the interim maps were "preliminary." But that misses the point. Except for HD90, every district invalidated below was subject to pending claims in 2012. The district court was operating under a mandate to review those claims and impose maps "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). And the district court assured the parties that it "obey[ed] [this] Court's directive" and remedied all "plausible legal defects" identified by plaintiffs' claims against the 2011 maps—as the district court was required to do for all claims that were merely "not insubstantial" under the lower VRA §5 standard set forth in this Court's *Perry* decision. H.J.S. App. 313a; *accord* C.J.S. App. 408a.

Accordingly, even accepting the fundamentally flawed notion that the 2013 Legislature was under some obligation to "remove" any "taint" of intentional discrimination from the court-ordered maps, the district court itself had already concluded that no such taint existed. The Legislature cannot plausibly be said to have engaged in intentional discrimination by taking the district court at its word—particularly given the strong "presumption of good faith" to which the Legislature's actions were entitled and the "extraordinary caution" courts must apply when confronting claims alleging an unlawful legislative purpose. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

That is all the more true given the context in which the district court's assurances came. By the time the court imposed its remedial maps in 2012, there had already been: (1) a two-week trial and multiple rounds of post-trial briefs in 2011, culminating in the first set of court-ordered remedial maps; (2) an appeal resulting in this Court's *Perry* opinion vacating those maps; and (3) post-remand hearings and additional briefing on pending claims—including briefing on claims in the parallel §5 proceedings before the D.C. district court.

If the district court truly believed that it lacked sufficient time to adequately address plaintiffs' claims before issuing remedial maps, it would have revisited those claims immediately after the 2012 elections. And if it believed the remedial maps incorporated any discriminatory "taint" that should have been apparent to the Legislature when it adopted the court-ordered districts in 2013, the district court could not have denied *two* motions

to enjoin the Legislature's 2013 plans, leaving them in place for four years and two election cycles while it adjudicated moot claims against the repealed 2011 plans. Those are hardly the actions of a court concerned that it may have violated this Court's mandate to impose maps "that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396.

Rather than point to any evidence that the Legislature enacted the court-imposed plans for a discriminatory purpose (because there is none), plaintiffs accuse the 2013 Legislature of having "rushed" the plans through. That is manifestly wrong: The Legislature in fact heard nearly 33 hours of debate over 11 public hearings, after which it held floor debates spanning over 1,000 pages in the House and Senate journals. But it is also beside the point. Plaintiffs' burden was to prove that the Legislature enacted those plans in a deliberate effort to sort voters on the basis of race or adversely affect minority voters. Even assuming (contrary to reality) that the Legislature *had* "rushed" the maps through, that would not begin to prove that the Legislature enacted court-imposed remedial districts for an illicit purpose.

Moreover, plaintiffs do not dispute that it is not possible to draw additional performing majority-minority districts, as defined in *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality op.), in either the congressional or state-house plans—even though nine groups of plaintiffs and multiple experts spent more than six years trying to do so. That shows that plaintiffs' case is not about legal defects in the State's maps or the makeup of the State's

legislative delegations; it is about plaintiffs' desire to reimpose preclearance on the State of Texas after *Shelby County v. Holder*, 570 U.S. 529 (2013).

In the end, then, plaintiffs are forced to spend most of their time complaining about the motivations of the *2011* Legislature. Those complaints are unfounded, as the district court correctly concluded in 2012 and Judge Smith's dissent rightly recognized in 2017. But they are ultimately irrelevant, as this case is about the actions of the 2013 Legislature, and plaintiffs did not come close to meeting their burden of proving an unlawful purpose—with or without the strong presumption of good faith to which those actions are entitled.

I. This Court Has Jurisdiction To Review The District Court's Orders.

The three-judge district court issued orders on the eve of election deadlines that had the practical effect of blocking the State from using its existing redistricting plans for the 2018 elections. The orders did much more than merely invalidate districts in Plans C235 and H358. The court concluded that these purported violations "now require a remedy" and "must be remedied either by the Texas Legislature or this Court." C.J.S. App. 118a-119a; *see* H.J.S. App. 84a, 86a. And it gave the Governor just three days to call a special session or, failing that, ordered defendants to participate in expedited judicial redistricting. There can be no serious dispute that if the State had responded by declining to redistrict and notifying the court that it would still use the existing plans in the 2018 elections, defendants would have been held in contempt. Tellingly, plaintiffs do not even try to

claim there was any prospect that the State could still use Plans C235 or H358 in the 2018 elections. That should be the end of the matter, as it is plain that the district court prohibited the State from using its maps in further elections.

Plaintiffs nonetheless insist that this Court lacks jurisdiction under the "plain language" of 28 U.S.C. §1253 because the district court did not label its order an "injunction." H.Br.29.[1] In other words, they insist that §1253 imposes a magic-words test. That is the only way to understand their contention (H.Br.29, 30-31) that this Court lacks jurisdiction here despite having jurisdiction in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Gill v. Whitford*, No. 16-1161 (U.S.)—cases where district courts also invalidated districts and ordered the States to pass new plans, but had not yet imposed remedial plans when the States appealed. But this Court has already rejected a magic-words test in *Carson v. American Brands, Inc.*, holding that appellate jurisdiction turns on the "practical effect" of a court's order—not its label or its precise "terms." 450 U.S. 79, 83-84 (1981).

Plaintiffs try to limit *Carson* to 28 U.S.C. §1292(a)(1) appeals, H.Br.30, but nothing in the text of 28 U.S.C. §§1253 or 1292 could justify a functional approach for one and a magic-words test for the other. Section 1292(a)(1)

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[1] The abbreviation "Br." refers to the Brief for Appellants; "U.S.Br." refers to the Brief for the United States as Appellee in Support of Appellants; "C.Br." refers to the Brief for Appellees (Congressional Districts); and "H.Br." refers to the Brief for Appellees Other than the United States (State House Districts).

vests courts with jurisdiction over "[i]nterlocutory orders ... granting ... injunctions," and §1253 vests this Court with jurisdiction over "an order granting ... an interlocutory ... injunction." The fact that §1292(a)(1) does not apply "where a direct review may be had in the Supreme Court" is relevant only to determining the source of this Court's jurisdiction—not to determining what qualifies as an "injunction." Nor does it make any difference that §1253 is interpreted narrowly. H.Br.29-30. *Carson* acknowledged that §1292 is interpreted "narrowly" too, yet that did not stop the Court from holding that an order is appealable under §1292 if it has the "practical effect" of an injunction. 450 U.S. at 84.

This Court's decision in *Gunn v. University Committed to End the War in Viet Nam*, 399 U.S. 383 (1970), does not help plaintiffs either. In *Gunn*, the district court *stayed* its order finding a First Amendment overbreadth violation, then "entered no further order of any kind." *Id.* at 387. Moreover, the initial order was wholly unclear as to what "was to be enjoined" and "against whom" any order would run, leading appellants themselves to concede that it was really an "advisory opinion." *Id.* at 388, 389. Here, by contrast, there is no doubt about the who, what, or when: The district court ordered the State *immediately* to engage in expedited redistricting, and expressly refused to stay its order "pending the next session" of the Texas Legislature, as the court in *Gunn* had done.

Id. at 386. The district court thus placed the State in precisely the same situation as the States in *Gill* and *Cooper*, where this Court exercised appellate jurisdiction.[2]

Plaintiffs assert that the State's position "transforms every declaration of a violation into a *de facto* injunction." H.Br.33. Far from it. Declaratory relief, by itself, is insufficient to invoke this Court's appellate jurisdiction. *Mitchell v. Donovan*, 398 U.S. 427, 430-31 (1970) (per curiam). But where an order goes beyond declaring rights and compels the State to engage in immediate redistricting on the eve of election deadlines, there is no escaping the conclusion that the State has been enjoined from using its existing map. This Court's jurisdiction is just as clear here as it was in *Cooper* and *Gill*.

II. The Legislature Did Not Engage In Intentional Discrimination When It Enacted Districts Imposed By The District Court Itself.

The district court reached the remarkable conclusion that the Texas Legislature engaged in intentional discrimination when it adopted as its own the same districts that the court itself ordered the State to use in the 2012 elections. Try as they do, plaintiffs cannot justify that unprecedented and untenable result. Plaintiffs attempt to recharacterize the district court's decision as resting solely on factual findings about the Legislature's intent,

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[2] *Whitcomb v. Chavis*, 403 U.S. 914 (1971), is also consistent with exercising jurisdiction, as it was an unexplained order dismissing for lack of jurisdiction where expedited redistricting had not been ordered. *See* U.S.Br.23.

in hopes of cloaking it in clear-error review. But the district court did not make any finding that the Legislature acted with improper intent in 2013—because the court's fatally flawed "remove the taint" theory obviated the need to do so. Nor could the court have made any such finding, as plaintiffs' paltry evidence does not come close to establishing intentional discrimination, let alone overcoming the strong presumption that the Legislature's decision to enact the court's own maps was a good-faith effort to comply with the Constitution and the VRA and bring this already-protracted litigation to an end.

A. The District Court's Intentional Discrimination Analysis Rests on a Fatally Flawed Legal Standard.

Plaintiffs' efforts to defend the district court's intentional-discrimination holding as a factual finding entitled to clear-error review, H.Br.41-43; C.Br.1, 40, fail at the threshold. The district court never found that the 2013 Legislature enacted Plan C235 or H358 for an unconstitutional purpose—that is, in a deliberate effort to [illegible]rt voters on the basis of race, *Miller*, 515 U.S. at 916-17, or "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Instead, the court faulted the State for failing to prove that the Legislature "remove[d]" the purported "discriminatory taint" from the court-imposed plans before adopting them as its own. C.J.S. App. 46a.

That reasoning is wrong at every turn. First, it eviscerates both the strong "presumption of good faith" to

which legislative enactments are entitled and the "extraordinary caution" courts must employ when confronting unlawful-purpose claims. *Miller*, 515 U.S. at 916. If anything, the "normal presumption of good faith" should have been "heightened by the State's acceptance of the judicial plan." U.S.Br.30. Instead, the district court not only ignored the presumption, but reversed it, demanding that defendants prove that the maps were *not* "tainted" with "discriminatory intent."

For the most part, plaintiffs ignore the presumption of good faith as well. One of their briefs never even mentions it, while the other contends that it does not apply because the districts imposed by the court in 2012 were "entirely a product of lines drawn by the Legislature" in 2011. H.Br.36-37. That is wrong as a factual matter, *infra* pp.12-14, but it is also beside the point. While the United States is undoubtedly correct that the presumption applies with particular force given that the Legislature enacted court-imposed maps, the presumption is fully applicable even on the assumption that those maps were "legislatively drawn." H.Br.27. After all, the whole point of the presumption is to give the benefit of the doubt to "legislative enactments," *Miller*, 515 U.S. at 916, which the 2013 maps undoubtedly were. The presumption of good faith did not disappear just because an *earlier* legislature enacted *different* maps with purportedly discriminatory intent.

Hunter v. Underwood, 471 U.S. 222 (1985), does not suggest otherwise. "*Hunter* did not involve a subsequent legislative enactment at all," U.S.Br.33, let alone a subsequent legislative enactment codifying a judicial order.

There, the legislature merely sat on its hands while the courts struck down various provisions of a law admittedly passed with discriminatory intent, U.S.Br.30-31, and this Court expressly *reserved* judgment on whether the same law "would be valid if enacted today without any impermissible motivation." 471 U.S. at 233. Here, the Texas Legislature adopted different plans that the district court concluded remedied any "plausible" legal defects in the 2011 plans. H.J.S. App. 313a.

Relying on Justice Thomas's concurrence in *United States v. Fordice*, 505 U.S. 717, 746-47 (1992), plaintiffs also suggest that the presumption is not warranted where there is a history of discrimination. H.Br.46-47. But *Fordice* involved policies continued from a "*de jure* system" of racial segregation in public schools—and even then, the Court still required ongoing "discriminatory effects" to prove liability. 505 U.S. at 745 (Thomas, J., concurring) (quoting *id.* at 729 (majority op.)). As Justice Thomas's concurrence made clear, the Court considered "the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense," but it did "not formulate [its] standard in terms of a burden shift with respect to intent." *Id.* at 747.

Of course, the bare act of reenactment cannot "save" otherwise invalid legislation "from invalidity," C.Br.31 n.17, or "insulate" districts "from further challenge, regardless of their legal infirmities," H.Br.20. Reenactment has no bearing on claims of discriminatory *effects*, and it does not definitively answer the question of dis-

criminatory *intent*. Reenactment does, however, fundamentally alter the object of the intent analysis, which is the intent of the legislature that enacted the challenged law. And while a court need not blind itself to the history behind a law's enactment in assessing that intent, the new legislation does not lose its presumption of good faith just because a previous legislature enacted the same law with an allegedly illicit purpose. *See* U.S.Br.28-30.

Regardless, whatever questions may arise when a legislature enacts the *same* law but "manufacture[s] new legislative records," C.Br.28, that is manifestly not what happened here. Far from reenacting the 2011 maps, the 2013 Legislature repealed them and replaced them with maps imposed by the district court itself, which changed 9 congressional and 28 state-house districts. To be sure, those maps retained some aspects of the 2011 plans, but it is neither unusual nor legally suspect for a new law to retain aspects of its predecessor, and that certainly does not convert separate districting legislation into "legislative inaction." C.Br.27-28. Accordingly, the 2013 plans were entitled to the same presumption of good faith as any other districting plans, and could be invalidated only if plaintiffs satisfied their heavy burden of proving that the legislature enacted the court-imposed maps in a deliberate effort to sort voters on the basis of race, *Miller*, 515 U.S. at 916, or "because of" some unlawful "adverse effects" on minority voters, *Feeney*, 442 U.S. at 279.

Plaintiffs cannot short-circuit that analysis by complaining about the motivations of a different legislature in enacting a different law.[3]

B. There Is No Evidence that the 2013 Legislature Engaged in Intentional Discrimination.

Unable to defend the district court's legal reasoning, plaintiffs resort to distorting the record. But their efforts do not bring them any closer to meeting their heavy burden of proving that the Legislature engaged in intentional discrimination.

1. Plaintiffs first try to avoid the presumption of good faith by insisting that the court-imposed plans were not really "the *court*'s" because they retained some districts from the 2011 plans. H.Br.36 (emphasis added). That argument misses the point. Defendants have never claimed that everything in the court-ordered maps was "the court's idea." H.Br.37. There is no dispute that the court retained some districts from the 2011 maps. But that is not an accident, or the product of some hoodwinking by defendants. It is a direct and intended consequence of this Court's decision in *Perry*, which specifically instructed the district court to "take care not to incorporate into the interim plan any legal defects in the state plan," but to *preserve* districts that were *not* subject to "not insubstantial" §5 claims or to constitutional or VRA

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[3] Indeed, plaintiffs previously insisted on separate trials for the 2011 and 2013 plans because "the state actors responsible for creating the 2011 and 2013 redistricting plans are different." Plaintiffs' Advisory in Support of Proposed Scheduling Order at 4 (Oct. 9, 2013), ECF No. 921.

§2 challenges that were "likely to succeed on the merits." 565 U.S. at 394.

And that is precisely what the district court did. It ordered the State to use the 2012 maps only after carefully reviewing all pending claims against the 2011 maps and concluding that every "plausible" legal defect had been remedied. H.J.S. App. 313a. Plaintiffs claim that the Legislature was not entitled to rely on the district court's orders because they were "preliminary." H.Br.37. But the district court assured the parties that it "obey[ed] [this] Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced." H.J.S. App. 313a. Preliminary or not, the Legislature was certainly entitled to take the district court at its word that it had complied with this Court's mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396.

Plaintiffs' claim that the district court's 2012 orders "did nothing more than decline to enter a preliminary injunction" against the unprecleared 2011 plans is demonstrably false. H.Br.28. The district court had already entered a preliminary injunction against those plans in 2011. J.A. 17a. In 2012, the court affirmatively ordered the State to conduct its upcoming elections under plans that had been reviewed, approved, and substantially modified, with changes to 9 congressional and 28 statehouse districts. C.J.S. App. 423a ("This Court has independently reviewed Plan C235 . . . ."); H.J.S. App. 315a (referring to "this Court's independently drawn Plan

H309"). The court did so, moreover, after having conducted two weeks of trial, held several days of hearings, and received hundreds of pages of briefing on plaintiffs' claims—including additional briefing and hearings following this Court's remand. J.A. 4a-20a; C.J.S. App. 380a. That is a world apart from cases where parties "relied on a short stipulation of facts" and underdeveloped legal theories, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981), and where the district court was "disconcerted by the hurried character of the proceeding" that occurred the day after the preliminary injunction motion was filed, *Sole v. Wyner*, 551 U.S. 74, 79 (2007).

In short, the notion that the district court in 2012 "simply 'defer[red]'" to the preferences of the Legislature, H.Br.19, strains credulity. The court imposed the 2012 maps only after careful consideration of the very same challenges pressed here, and with the express assurance that they addressed all "plausible legal defects" in the 2011 plans. H.J.S. App. 313a. The Legislature did not engage in intentional discrimination by taking the district court at its word.

2. Plaintiffs next insist that "the Legislature did not actually believe that 'passing the interim maps would end the litigation.'" H.Br.43. If they mean that the Legislature knew plaintiffs would continue to fight them no matter what maps they passed, then they are certainly correct. The Legislature did, however, have an eminently good-faith basis to believe that *the district court* would not invalidate the maps that it had just ordered the State to use. Plaintiffs cite no evidence for their charge that the 2013 Legislature enacted districts *because* they were

allegedly "drawn in 2011 for discriminatory reasons." H.Br.45.[4] And there is nothing remotely constitutionally suspect about adopting new maps because they are more likely than the previous maps to satisfy the Constitution and VRA. After all, it would be a strange doctrine indeed that viewed with suspicion efforts by subsequent legislatures to remedy the perceived missteps of their predecessors.

Plaintiffs protest that the 2013 redistricting plans were adopted too "'quickly,' with no real discussion of district configurations." H.Br.43. Nonsense. The redistricting legislation was under consideration for 22 days—almost the entire 30-day special session. Br. Stat. App. 34a, 36a; Tex. Const. art. III, §40. The House and Senate committees held more than 30 hours of public hearings in multiple cities, resulting in more than 1,300 transcript pages. *See* 2017 JX-10-15, 20-24. And the separate floor debate accounted for more than 1,000 pages in the Texas House and Senate Journals. *See* 2017 JX-17-18; 2017 JX-26-27. The Legislature adopted multiple amendments to Plan H309, and it considered several amendments to Plan C235, most of which were rejected on bipartisan votes in the Senate Redistricting Committee. *See* 2017 JX-24.4.

Plaintiffs charge the Legislature with "[w]illfully ignor[ing] those who pointed out deficiencies" in the court-ordered plans. C.Br.21 (citing C.J.S. App. 45a n.45). But

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[4] As for supposed "self-contradictory statements" by "legislative leaders," H.Br.43, the cited footnote (H.J.S. App. 358a n.45) does not identify any such statement.

neither the district court nor plaintiffs identified a single "deficiency" that was "pointed out" to the Legislature but ignored.[5] Jeff Archer, an attorney at the Texas Legislative Council, did not identify any "deficiency" in the court-ordered plans. Instead, his cited testimony consists only of general statements about the procedural posture in which those orders were issued. *See* U.S.Br.42. Notably, Archer specifically declined to discuss the "validity" or "legal ramifications" of any proposed alternative plan. *See* 2017 JX-14.4 at 7. Plaintiffs' counsel MALDEF, by contrast, informed the Legislature that these remedial plans addressed every defect identified by the D.C. district court under VRA §5. C.J.S. App. 436a-439a.

Plaintiffs also argue that the "legislative findings regarding the 2013 [state-house] plan were in fact produced ahead of time by the Texas Attorney General." H.Br.43. But the Attorney General's advice to the Legislature to make its legislative findings part of the statutory text says nothing about the Legislature's purpose. And there is no evidence that the Legislature did not believe those findings—let alone that it did not believe the

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[5] Nor was there any "'steadfast refusal' to consider creating additional minority opportunity districts." H.Br.20. Plaintiffs are really complaining about the Legislature's decision not to create additional crossover or coalition districts, which, as plaintiffs' congressional brief concedes (C.Br.4 n.2), are not the same thing as "minority opportunity districts." The failure to adopt crossover or coalition districts cannot support a finding of intentional discrimination, as VRA §2 does not require either one. *See Bartlett*, 556 U.S. at 15.

district court's express assurance that it followed this Court's directives. *See* C.J.S. App. 423a; H.J.S. App. 313a.

Rather than engage the legislative history, plaintiffs distort the timeline to create a false impression that the 2013 Legislature reenacted districts *after* the district court had already found them "tainted" by intentional discrimination. In Bell County, for example, where the Legislature did not change the district boundaries in 2013, plaintiffs assert that "[t]he court had earlier found that in configuring the Bell County districts, Representative Aycock had deliberately 'divided the growing minority City of Killeen to protect his incumbency.'" H.Br.22 (citing H.J.S. Supp. App. 289a). In fact, the district court reached that conclusion nearly four years *later*, in its 2017 advisory opinion on the 2011 maps. The 2013 Legislature obviously could not have "intended to continue the intentional discrimination found in Plan H283," H.Br.22 (quoting H.J.S. App. 22a), when there was no such "finding" until 2017.

3. Finally, plaintiffs' post-hoc efforts to undermine the conclusions the district court reached in 2012 are entirely unfounded, and provide no basis to question the Legislature's good faith in relying on the district court's express assurance that it followed this Court's mandate to impose maps that complied with the Constitution and the VRA.

First, plaintiffs' allegation that the court was not aware in 2012 that "it was possible to draw two majority

HCVAP districts" in Nueces County, H.Br.38, is irrelevant. Mapdrawers relied on Spanish-surname-voter-registration data when drawing House districts in 2011 because citizen-voting-age-population data were not available until late April. H.J.S. App. 129a. There is no evidence that they deliberately refused to consider HCVAP data. In any case, Texas Legislative Council attorneys correctly advised that two *performing* Hispanic-opportunity districts could not be drawn in Nueces County. H.J.S. Supp. App. 93a. The Legislature's decision not to divide Nueces County in a way that would have *diluted* Hispanic voting strength is not evidence of intentional discrimination.

Second, Representative Aycock's testimony at retrial in 2014, H.Br.38, does not support a conclusion of intentional discrimination or racial predominance in HD54. He merely testified that he attempted to create a Republican district by adding areas that supported Republicans. Br.54-56. Drawing a Republican district is not racial discrimination, "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). In any event, the district court correctly rejected the only claims that plaintiffs actually brought in Bell County. *Infra* pp.26-27.

Third, plaintiffs' claim that the court had not "heard from the architect of the challenged districts in western Dallas County" in 2012 is simply wrong. H.Br.38. That individual (Ryan Downton) gave extensive live testimony

in 2011, *see* 2011 Tr. 903-1023, which the district court cited in its 2012 opinion. C.J.S. App. 411a, 414a, 422a.

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At bottom, neither the record nor common sense supports the district court's implausible conclusion that the Legislature engaged in intentional discrimination when it embraced court-imposed districts as its own. Plaintiffs do not even try to explain how the very same districts could be lawful when imposed by the district court, but "tainted" with discriminatory intent when later enacted by the Legislature.

III. There Never Was Any Vote Dilution Or Racial Gerrymandering To Begin With In The Districts Imposed By The District Court In 2012.

By the time the district court held a second trial on claims against the 2011 maps, those maps had been repealed, rendering any dispute about the motivations underlying them moot—a proposition that plaintiffs barely even bother to contest. That said, the district court's "remove the taint" theory fails on its own terms because there never was any "taint" to "remove" in the first place.[6]

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[6] To the extent the district court found intentional discrimination based on one-person, one-vote violations (*see* Br.56-58, 62-63), plaintiffs have waived those arguments by choosing not to defend them on appeal.

A. There Was No Vote Dilution in Districts Imposed by the District Court in 2012.

1. Intentional-vote-dilution claims require proof of an actual vote-dilution effect.

At the outset, all of the district court's intentional-vote-dilution findings were infected by its erroneous conclusion that intention-vote-dilution claims do not require proof of vote dilution. Intentional-vote-dilution claims require proof of both intent to dilute minority voting strength *and actual* dilution of minority voting strength. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (explaining that districts "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"). Those requirements do not change just because a plaintiff alleges that vote dilution was "intentional."

Plaintiffs cannot escape that conclusion by asserting a constitutional rather than a VRA claim, because the Constitution no more recognizes an intentional-vote-dilution claim without vote dilution than the VRA does. To the contrary, the constitutional test for vote dilution is *more* demanding than the VRA test, as it requires both discriminatory effects *and* discriminatory intent. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980) (plurality op.). As *Gingles* explained, VRA §2 "was designed to restore the 'results test'—the legal standard that governed voting discrimination cases prior to [this Court's] decision in *Mobile*," under which discriminatory effects alone were enough to establish a constitutional violation. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.8 (1986).

Accordingly, while the Constitution demands discriminatory intent *and* discriminatory effects after *Mobile*, VRA §2 now requires only the latter. But plaintiffs do not and cannot cite precedent holding that the Constitution requires only the former.

Instead, plaintiffs rely principally on cases involving VRA §5. *See* H.Br.48.[7] But those cases are readily distinguishable, as that statute requires the State to prove that its voting laws do not have *either* a discriminatory purpose *or* a discriminatory effect. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 471 (1987); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). This Court has expressly refused, however, "to equate a § 2 vote dilution inquiry with the § 5 retrogression standard." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). And it has certainly never equated the §5 standard with the Equal Protection Clause, which requires plaintiffs to prove both discriminatory intent and discriminatory effects.

To the extent cases suggest, in dicta, that a law with a race-based purpose "has no legitimacy at all under our Constitution," *see Pleasant Grove*, 479 U.S. at 471 n.11, this Court's modern precedents recognize that as a racial-gerrymandering claim. For example, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cited in Bartlett*, 556 U.S. at 20, was decided before this Court recognized racial-gerrymandering claims in 1993 in

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[7] Plaintiffs also cite *Rogers v. Lodge*, 458 U.S. 613 (1982), H.Br.48, but that case involved actual vote-dilution effect. *See* 458 U.S. at 623-27.

Shaw, 509 U.S. at 649. Under the Court's current doctrine, the appropriate claim in *Garza* would be racial gerrymandering, because the county redistricted "with the intent to fragment the Hispanic population" among various districts—even though no vote dilution actually occurred. 918 F.2d at 770.

To establish an intentional-vote-dilution claim, then, plaintiffs must establish both that the Legislature intended to dilute minority voting strength *and* that the Legislature succeeded in doing so. And to establish the latter, plaintiffs must prove that it was possible to draw an additional performing majority-minority district. *See, e.g.*, *Bartlett*, 556 U.S. at 15; *LULAC v. Perry*, 548 U.S. 399, 430 (2006). As plaintiffs' congressional brief correctly recognizes, "[a] minority opportunity district under §2 is one in which minority voters [1] comprise a majority of eligible voters and [2] have a reasonable opportunity to elect candidates of their choice." C.Br.4 n.2. Accordingly, plaintiffs cannot establish vote dilution by faulting the Legislature for declining to draw a coalition district. *But see* H.Br.49 (alleging intentional vote dilution in Bell County because the "legislature's decision to split Killeen minimized the voting strength of a multi-minority coalition"). This Court has recognized that VRA §2 does not require States to draw coalition districts. *See Perry*, 565 U.S. at 398 (citing *Bartlett*, 556 U.S. at 13-15). And with good reason, as requiring coalition districts would only inject further considerations of race into redistricting. *Bartlett*, 556 U.S. at 21-22.

Plaintiffs nonetheless persist in urging a much broader conception of vote dilution, insisting that it exists "whenever the challenged district makes it harder for the minority community to participate effectively in the political process." H.Br.49. That attempt to replace the long-settled definition of vote dilution with an undefined "discernible discriminatory effect" standard, H.Br.28, smacks of an effort to resuscitate the VRA §5 retrogression standard, which considers "the diminution of a minority group's effective exercise of the electoral franchise." *Ashcroft*, 539 U.S. at 479. But this Court has expressly refused to export that standard to the VRA §2 or Equal Protection Clause contexts.

In sum, a challenged apportionment scheme either results in dilution of minority voting strength or it does not. Alleging intentional vote dilution adds the element of discriminatory intent, but it does not change the requirement to prove that vote dilution actually occurred. The district court's contrary belief fatally infected all of its intentional-vote-dilution findings on the 2013 plans.

2. There was no discriminatory intent or effect in CD27.

Under a correct understanding of the law, plaintiffs did not and could not prove intentional vote dilution in CD27.[8] The district court sustained plaintiffs' claim on

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[8] The district court "did not base its holdings . . . on a § 2 effects claim" in CD27. C.J.S. App. 113a-114a; *id.* at 113a n.85 ("If . . . there was no evidence of improper intent, this would be a different case . . . ."). Regardless, there was no vote-dilution effect in CD27. Br.48-51.

the theory that intent alone was enough. C.J.S. App. 112a-114a & n.85; *cf.* U.S.Br.16-17. In fact, the court expressly found that CD27 does "not diminish Hispanic voter opportunity for § 2 effects purposes" because "no additional compact Latino opportunity district could be drawn" in the region—a finding plaintiffs do not challenge. C.J.S. App. 113a; *see* C.Br.51. That should be the end of the matter, as a vote-dilution claim cannot survive without proof of vote dilution. *See supra* Part III.A.1. Plaintiffs nonetheless argue that their §2 rights were violated because certain Hispanic voters in CD27 could have been included in an existing majority-minority district elsewhere (CD34, anchored in Cameron County). But that is not a viable theory of vote *dilution* under §2 or the Constitution (or even a §5 retrogression problem, as the D.C. district court rightly concluded, *Texas v. United States*, 887 F. Supp. 2d 133, 153 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.)).

At any rate, there was no intentional discrimination in CD27 to begin with. The 2011 Legislature's decision to move Nueces County to a separate district from Cameron County had nothing to do with Hispanic voters in Nueces County or with Travis County or CD35. The decision was instead made at the request of citizens and legislators in both Nueces and Cameron Counties, Br.51-52—and was made at the beginning of the 2011 redistricting process, before the Legislature had even received census data. Aug. 2014 Tr. 1761-62, 1772-73. Plaintiffs refuse to respond to that evidence, C.Br.45, and they do not identify any contrary evidence, or even any supposed "inconsistencies" in the record, C.Br.47. That is

because there simply is no evidence that the Legislature acted, in 2011 or 2013, for the purpose of discriminating against Hispanic citizens in Nueces County.

Purporting to rely on *Feeney*, 442 U.S. at 279, plaintiffs argue that discriminatory purpose can be inferred from the Legislature's mere knowledge that its redistricting would have "adverse consequences ... on an identifiable group—here, minority voters." C.Br.47 n.25. As an initial matter, there were no unlawful adverse consequences because there was no vote dilution. Regardless, that radical argument conflicts directly with *Feeney*, which admonished that "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. This is especially true in the redistricting context, where "the legislature always is *aware* of race." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Shaw*, 509 U.S. at 646). Thus, this Court cited *Feeney* when it made clear that partisan redistricting does not become racial gerrymandering "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 551.

With no other leg to stand on, plaintiffs contend that this case "obvious[ly] parallels" *LULAC*, asserting that the 2011 Legislature impermissibly "engineered a trade that took §2 rights from those who have them to provide a §2 remedy to those who do not." C.Br.51-52. This theory has no basis in evidence. The State has never argued that CD35 "offset" CD27. *Cf. LULAC*, 548 U.S. at 429. Regardless, the Legislature could not "take" §2 rights

from Hispanic voters in Nueces County because those voters do not have a VRA §2 right to be placed in a majority-minority district, as it is impossible to draw another majority-minority district in the area. *See* C.J.S. App. 114a, 127a-131a, 421a. That readily distinguishes this case from *LULAC*, where the State *could* have drawn another majority-minority district in the relevant area, but opted not to do so. *LULAC*, 548 U.S. at 429. Accordingly, the fact that CD35 is a majority-minority district is simply irrelevant to plaintiffs' unfounded challenge to CD27.

3. There was no discriminatory intent or effect in Bell County state-house districts.

Plaintiffs understandably have very little to say about the district court's incoherent conclusion regarding Bell County state-house districts. The district court correctly found no §2 results violation because it is undisputed that a "majority-minority CVAP" district cannot be drawn in Bell County. H.J.S. App. 18a, 180a. And it correctly found that the 2011 Legislature's "failure to create the proposed [coalition] districts was not intentional vote dilution." H.J.S. App. 18a.

Despite these findings, the district court perplexingly found "intentional discrimination/vote dilution." H.J.S. App. 22a. It purported to base that finding on "evidence that mapdrawers ... intentionally racially gerrymandered the district." H.J.S. App. 18a. But no plaintiff even asserted a racial-gerrymandering claim in Bell County, H.J.S. App. 192a-193a—and with good reason, as there is no evidence that race predominated in the creation of Bell County state-house districts. Having rejected

claims of intentional vote dilution and vote-dilution effect, and having recognized that plaintiffs did not bring racial-gerrymandering claims, the district court had no basis to find *any* violation in Bell County.

4. There was no discriminatory intent or effect in Dallas County state-house districts.

Plaintiffs do not dispute plaintiff MALC's expert's concession that it was not possible to create additional districts in Dallas County with an African-American or Hispanic citizen-voting-age-population majority.[9] Nor do they dispute that the 2011 Legislature designed HD105 to pair two Republican incumbents. The district court correctly rejected plaintiffs' claims that the 2011 Legislature engaged in vote dilution by failing to create *coalition* districts. H.J.S. App. 26a. And plaintiffs did not bring racial-gerrymandering claims in Dallas County. H.J.S. App. 192a-193a. The district court thus had no basis to hold that the 2011 Legislature, let alone the 2013 Legislature, engaged in either intentional vote dilution or racial gerrymandering.

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[9] Plaintiffs' claim that under the 2011 plan, "Anglos controlled nearly 60% of Dallas County's house seats with only one-third of its population," H.Br.12, is misleading because it relies on *total* population rather than *voting-eligible* population. The district court recognized that of approximately 900,000 Hispanic residents of Dallas County, "only 256,195 were Hispanic citizens of voting age." H.J.S. App. 169a. Vote-dilution claims require examination of *voting-eligible* population. *See, e.g.*, *LULAC*, 548 U.S. at 429.

5. There was no discriminatory intent or effect in Nueces County state-house districts.

Nueces County's state-house plan is the only area where the district court sustained a VRA §2 vote-dilution results claim in addition to an intent claim. But neither of those findings can withstand scrutiny, as plaintiffs do not and cannot contend that the Legislature could have drawn two *performing* majority-Hispanic districts in Nueces County.[10] In fact, the district court expressly declined to hold that VRA §2 required the Legislature to draw two majority-minority districts in Nueces County. H.J.S. App. 60a. That is fatal to plaintiffs' claims.

Nevertheless, the district court found both vote-dilutive intent and vote-dilutive effects on the basis that the 2011 Legislature failed to "explor[e] whether two HCVAP-majority districts wholly within Nueces County should be drawn." H.J.S. App. 59a. But any additional "exploration" would have been futile because two *performing* majority-Hispanic districts could not be drawn. Plaintiff MALC's own expert concluded that drawing two Hispanic-CVAP-majority districts wholly within Nueces County would result in "a lack of real electoral opportunity in *both* districts." H.J.S. App. 44a (emphasis added). The Legislature's choice to avoid that pitfall was neither intentional nor actual vote dilution.

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[10] Plaintiffs do not challenge the district court's holding that VRA §2 did not require the State to break its whole-county rule. *See* Br.66 (citing H.J.S. App. 49a-50a, 59a).

B. There Was No Racial Gerrymandering in CD35.

Plaintiffs do not deny that CD35 was drawn as one of seven majority-Hispanic districts in the region, or that the Legislature was required to draw seven such districts in 2011.[11] Nor do plaintiffs argue that the *Gingles* preconditions, including racial bloc voting, are not satisfied in CD35 as a whole. *See* U.S.Br.48. That should lay to rest any doubts about whether the Legislature had the requisite "good reasons" to make it a majority-minority district.

Plaintiffs nonetheless claim (C.Br.38-39) that CD35 was a racial gerrymander because racial bloc voting does not exist *in Travis County*—which comprises only a small fraction of the population and area of CD35.[12] *See* U.S.Br.48. Plaintiffs fundamentally misunderstand the *Gingles* inquiry. As this Court explained just last Term, "[t]he ultimate object of the inquiry" is the "district as a whole." *Bethune-Hill*, 137 S. Ct. at 800. Indeed, it must be, because the question under the third *Gingles* condition is whether "racially polarized voting prevents" a minority group from electing its candidate of choice. *Cooper*, 137 S. Ct. at 1470 (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

Cooper v. Harris does not support plaintiffs' argument (C.Br.43) that the absence of racial bloc voting in a

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[11] The relevant region is South, Central, and West Texas. C.J.S. App. 423a. Plaintiffs' term "the envelope," C.Br.4, was concocted in litigation to establish a fictitious geographic boundary.

[12] Travis County accounts for only 21% of CD35's population. C.J.S. App. 181a.

portion of a district defeats the third *Gingles* condition. *Cooper* held that the State lacked good reasons to believe that VRA §2 required it to add additional minority voters to an *existing* district that consistently elected minority-preferred candidates. 137 S. Ct. at 1465-66. *Cooper* did not hold that VRA §2 cannot justify a *new* district, like CD35, merely because racial bloc voting may not exist in a portion too small to control outcomes in the district as a whole.

Plaintiffs rely on *Shaw v. Hunt*, 517 U.S. 899, 916 (1996), to argue that the Legislature did not have license to draw a majority-minority district "anywhere"—by which they mean to draw a majority-minority district that included Travis County. C.Br.42. But the Legislature could lawfully draw the district anywhere it had good reason to believe all three *Gingles* factors were met. *Cf. Shaw*, 517 U.S. at 916 (racial classification did not remedy VRA violation because district did not meet first *Gingles* requirement). And that is exactly what the Legislature did when it created CD35.

In all events, the VRA-compliance defense to a racial-gerrymandering claim does not require a "perfect" VRA analysis ahead of time. *Cooper*, 137 S. Ct. at 1464. Rather, so long as the Legislature had "good reason" to believe the district would remedy a potential VRA §2 problem (even if it turns out that the VRA did not actually require the district), then the district is not a racial gerrymander. *Id.* at 1470. Here, plaintiff's counsel MALDEF proposed CD35's Austin-to-San-Antonio configuration, C.J.S. App. 411a; and the Latino Task Force plaintiffs supported CD35, C.J.S. App. 174a. These are

about the best reasons possible to believe that CD35 was needed to satisfy VRA §2.

Plaintiffs' real complaint is not that the Legislature included part of Travis County in CD35, but that it eliminated an Anglo-majority crossover district previously based in Travis County. But the district court did not find a violation on this basis, Br.47 n.12, because it correctly recognized that §2 does not require the State to preserve crossover districts. C.J.S. App. 409a (citing *Bartlett*, 556 U.S. at 23). Plaintiffs racial-gerrymandering claim is just another attempted end-run around *Bartlett*.

IV. There Was No Racial Gerrymandering In HD90.

Finally, the 2013 Legislature did not engage in racial gerrymandering when it modified HD90 to accommodate requests from two different groups of minority voters. Plaintiffs do not dispute that HD90 was drawn as a majority-Hispanic district at plaintiffs' request in 2011 and retained by the district court in 2012. *See* H.J.S. Supp. App. 258a-259a. They do not suggest that this configuration was not required by VRA §2, nor do they attempt to defend the district court's patently incorrect holding that VRA compliance is just "a vague goal," rather than a defense to a racial-gerrymandering claim. And the only other explanation the district court offered for its ruling on HD90 is readily refuted by the undisputed evidence. According to the district court, "no one considered the legal significance of the 50% [Spanish-surname-voter-registration] target in terms of compliance with the VRA." H.J.S. App. 82a. But the record shows that plaintiff MALC specifically objected to the initial draft amendment to HD90 on the ground that reducing the

Spanish-surname-voter-registration population in HD90 below 50% would substantially dilute Hispanic voting strength. J.A. 398a-403a.[13]

Plaintiffs do not dispute that this objection directly motivated the incumbent's chief of staff—whose intent the district court attributed to the Legislature—to consider racial data to maintain HD90's Spanish-surname-voter-registration majority.[14] Instead, they blithely suggest that the Legislature should have simply refused to bring the Como neighborhood back into HD90. H.Br.54-55 & n.15. But plaintiffs tellingly do not acknowledge that Como is a predominantly African-American neighborhood—they describe it as "non-Latino," H.Br.54—or that residents of Como specifically asked to return their neighborhood to HD90, where it had been for decades. H.J.S. App. 71a-72a. There was nothing unlawful about returning Como to HD90 so long as the Legislature maintained HD90 as a majority-Hispanic district.

Indeed, even though the Legislature made sure that HD90 maintained a Hispanic voting majority, the State *still* faced an intentional-vote-dilution claim in HD90. And the district court rejected that claim only because the Legislature retained HD90 as a majority-Hispanic

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[13] Plaintiffs cannot avoid that evidence based on "credibility determinations." H.Br.53. They identify no credibility determination related to HD90, and none appears in the district court's order.

[14] Plaintiffs fault the Legislature for failing to compile a detailed administrative record in HD90, H.Br.54, but that is not required, *see Bush v. Vera*, 517 U.S. 952, 966 (1996) (plurality op.); *accord id.* at 1026 (Stevens, J., dissenting), and it does not change the undisputed facts.

district. H.J.S. App. 83a-84a. If that does not qualify as "good reason" to retain a majority-Hispanic district, *Cooper*, 137 S. Ct. at 1470, then States have no breathing room left to satisfy both the Constitution and the VRA.

CONCLUSION

The Court should reverse the district court's orders insofar as they invalidate districts in Plan C235 and Plan H358.

Respectfully submitted.

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